

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Winn-Dixie Stores Inc., et al, . . . Docket #: 5:15-cv-06480-BMS
Plaintiffs, . . . United States Courthouse
vs. . . Philadelphia, PA
Eastern Mushroom Marketing . . . March 21, 2022
Cooperative, et al, . . . 9:41 a.m.
Defendants. . .
.....

TRANSCRIPT OF CIVIL JURY TRIAL - DAY 15
BEFORE THE HONORABLE BERLE M. SCHILLER
UNITED STATES DISTRICT COURT JUDGE

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Further
Direct Cross Redirect Recross Redirect

Witnesses For The
Plaintiff:

None

Witnesses For The
Defendant:

None

EXHIBITS: Marked Received

None

THE COURT: Finding Page: 53

1 THE COURT: Good morning.

2 MR. AHERN: Good morning.

3 MR. DESTEFANO: Good morning.

4 MR. BELL: Good morning.

5 MR. BRUNELLI: Good morning.

6 THE COURT: Be seated. Yes?

7 MR. AHERN: Your Honor, I believe at one point you
8 entered an order saying you were going to --

9 THE COURT: I didn't enter an order.

10 MR. AHERN: Well, saying that you were enter -- you
11 were going to seat eight with two alternates.

12 THE COURT: I suggested eight, and everyone said we'll
13 do 10, and 10 is it.

14 MR. AHERN: Oh, okay, all right. I didn't remember
15 that, so -- but that's fine. That's fine. I wouldn't want --

16 THE COURT: You may lose a couple.

17 MR. AHERN: Well, I mean, I wouldn't -- you know, I
18 don't somebody who's been here for the whole time to miss out
19 on actually the deciding part, you know.

20 THE COURT: This is the exciting part.

21 MR. AHERN: No, the deciding part. I don't want them
22 to miss out on that.

23 THE COURT: Okay, good. Now, they won't.

24 MR. AHERN: Yeah.

25 THE COURT: Quiet over there.

1 (Jury in at 9:44 a.m.)

2 THE COURT: Good morning, everybody. Welcome back.

3 I'm glad we all made it this far. Please be seated. I hope
4 your brackets weren't busted over the weekend.

5 Members of the jury, I want to thank you, once again,
6 for all of your time and patience over the last three weeks,
7 and for serving as jurors in this matter. You sat through a
8 lot of testimony, seen a lot of documents, and heard a lot from
9 the lawyers. Now it's my turn. I'm going to read you the
10 instructions that will guide your deliberations.

11 You have all heard all the evidence that has been
12 admitted in this trial, and the arguments of counsel. It's my
13 duty to give you the final instructions as to the law that is
14 applicable to this case. Use these instructions to guide you
15 in your deliberations. Before I begin, I should let you know
16 that you'll receive a copy of these instructions in the jury
17 room. So, you don't have to catch everything I say.

18 All the instructions of law I gave you at the
19 beginning of the trial, during the trial, and these final
20 instructions must guide and govern your deliberations. It is
21 your duty to follow the law as stated in all the instructions
22 of the Court, and to apply these rules of law to the facts as
23 you find them from the evidence received during the trial.

24 Counsel has referred to some of the applicable rules of law,
25 and the Court's instructions. They are permitted to do so. In

1 fact, I gave them copies of these instructions last week.
2 However, if any difference appears to you between the law, as
3 stated by Counsel, and that as stated by the Court, you are to
4 be governed by the Court's instructions.

5 You're not to single out any one instruction alone as
6 stating the law. But you must consider the instructions as a
7 whole in reaching your decisions. Likewise, you're not to be
8 concerned with the wisdom of any rule of law stated by the
9 Court. Regardless of any opinion you may have as to what the
10 law ought to be, it would be a violation of your sworn duty to
11 base any part of your verdict on any view or opinion of the
12 law, other than those provided in the Court's instructions.
13 Just as it would be a violation of your sworn duty as the
14 judges of the facts to base your verdict upon anything, but the
15 evidence received in this case, and your common sense.

16 I'm sure you have come to realize whatever you think
17 you knew about trials, about evidence, or about the law as a
18 result of watching T.V. shows, or movies, or reading novel, has
19 no place here. No one involved in this case should be compared
20 to any T.V. show. Well, if you like the lawyer in the show,
21 compare him to me. A T.V. show, any movie, or any actor or
22 actress, this trial was not scripted in that fashion ahead of
23 time. You were chosen as jurors for this real-life trial to
24 evaluate all of the evidence received, and to decide each of
25 the factual questions presented to you.

1 As I mentioned, it is not uncommon, especially in long
2 trials like this one, for there to be some lighthearted
3 moments. But, as you know, this is an important and serious
4 manner. You must not be persuaded by bias, prejudice, or
5 sympathy for or against any of the parties to this case, or any
6 public opinion.

7 You have two main duties as jurors. The first one is
8 to decide what the facts are from the evidence that you saw and
9 heard here in Court. Deciding what the facts are is your job,
10 not mine. And nothing that I have said or done during this
11 trial was meant to influence your decision about the facts, in
12 any way. You are the sole judges of the facts.

13 Your second duty is to take the law that I give you
14 and apply it to these facts, and the burden of proof that I
15 will explain. My role is to instruct you about the law that
16 you should apply to the facts as you find them. I remind you
17 that you are bound by the oath that you took at the beginning
18 of the trial to follow the instructions I give you. Even if
19 you disagree with the law, you are not to consider whether the
20 principles I state to you are sound, or whether they accord
21 with your own views about policy. This includes instructions
22 that I gave you before trial, during the trial, and these
23 instructions, as well.

24 When you retire to the jury room to begin your
25 deliberations, you should select one member of the jury as a

1 foreperson. That person will preside over the deliberations,
2 and speak for you here, in open court. You will be given a
3 list of the witnesses in the order in which they appear.
4 Furthermore, if at some point you request the documentary
5 evidence that was admitted as evidence, the exhibits will be
6 provided to you.

7 You may also consult any notes you took during the
8 trial. However, you should make use of them only as an aid to
9 your own memory. Don't give your notes any precedence over
10 your independent recollection of the evidence or lack of
11 evidence. And neither should you be unduly influenced by the
12 notes of other jurors. I emphasize that the notes you may have
13 taken are not entitled to any greater weight than the memory or
14 impression of each juror as to what the testimony or other
15 evidence may have been. As jurors, you have a duty to consult
16 with each other and to deliberate with the intention of
17 reaching a verdict.

18 Each of you must decide the case for yourself, but
19 only after a full and impartial consideration of all the
20 evidence with your fellow jurors. Listen to each other
21 carefully in the course of your deliberations. You should feel
22 free to reexamine your own views, and to change your opinion
23 based upon the evidence. But you should not give up your
24 honest convictions about the evidence just because of the
25 opinions of your fellow jurors, nor should you change your mind

1 just for the purpose of obtaining enough votes for a verdict.

2 During your deliberation, you should not talk to the
3 Courtroom Deputy, to me, or to anyone but each other about the
4 case. You must not communicate with or provide any information
5 to anyone by any means about the case. You may not use any
6 electronic device or media, such as a cell phone, smartphone,
7 or computer of any kind, the internet, including any internet
8 chatroom, blog, website, or social networking service, such as
9 Facebook, Instagram, Twitter, and YouTube to communicate to
10 anyone any information about this case, or to conduct any
11 research about this case until I accept your verdict.

12 You may not use electronic means to investigate or
13 communicate about the case. It is important that you decide
14 this case based solely on the evidence presented in this
15 courtroom. Information on the internet or available through
16 the social media might be wrong, incomplete, or inaccurate.
17 Information that you might see on the internet or on social
18 media has not been admitted into evidence, and the parties have
19 not had a chance to discuss it with you. You should not seek
20 or obtain such information, and it must not influence your
21 decision in this case.

22 If you have any questions or messages for me during
23 your deliberations, you must write them down on a piece of
24 paper, have the foreperson sign them, and give them to the jury
25 officer. The officer will give them to me, and I will respond

1 as soon as I can. I may have to talk to the lawyers about what
2 you've asked, so it may take some time to get back to you. One
3 more thing about messages. Never write down or tell anyone how
4 you stand on your votes. For example, do not write down or
5 tell anyone that a certain member is voting one way or another.
6 Your vote should stay secret until you are finished.

7 Your verdict must represent the considered judgment of
8 each juror. In order for you, as a jury, to return a verdict,
9 each juror must agree to the verdict. Your verdict must be
10 unanimous. A document called a Verdict Sheet or Verdict Form
11 has been prepared for you. It has a series of questions for
12 you to answer. You will take this form to the jury room, and
13 when you have reached unanimous agreement as to your verdict,
14 you will fill it in and have your foreperson date and sign the
15 form. You will then return to the courtroom, and your
16 foreperson will give your verdict. Unless I direct you
17 otherwise, do not reveal your answers until you are discharged.

18 After you have reached a verdict, you are not required
19 to talk with anyone about the case, unless I order you to do
20 so. Once again, I want to remind you that nothing about my
21 instructions, and nothing about the verdict sheet is intended
22 to suggest or convey in any way or manner what I think your
23 verdict should be. It is your sole and exclusive duty and
24 responsibility to determine the verdict.

25 This is a civil antitrust case. Winn-Dixie Stores,

1 Incorporated brought this lawsuit and is the Plaintiff. The
2 parties against whom the lawsuit was brought are the
3 Defendants. There are several Defendants in this litigation.
4 I'll list them for you. Brownstone Mushroom Farms, Inc., C&C
5 Carriage Mushrooms Company, Country Fresh Mushroom Company,
6 Gino Gaspari and Sons, Inc., Giorgi Mushroom Company, Kaolin
7 Mushroom Farms, Inc., Leone Pizzini and Son, Inc., Louis M.
8 Marson, Jr., Inc., Modern Mushroom Farms, Inc., Monterey
9 Mushrooms, Inc., Oakshire Mushroom Farms, Inc., Phillips
10 Mushroom Farms, Inc., South Mill Mushroom Sales, Inc., The
11 Eastern Mushroom Marketing Cooperative, Inc. EMMC, To-Jo Fresh
12 Mushrooms, Inc., and United Mushroom Farm Cooperative, Inc.

13 The Plaintiff, Winn-Dixie, has the burden of proving
14 its case against the Defendants by what is called a
15 preponderance of the evidence. You may have heard the term,
16 proof beyond a reasonable doubt, and I mentioned in the
17 beginning of this trial, that is a stricter standard of proof
18 and it applies only to criminal cases. It goes not apply in
19 civil cases, such as this. So, you should put that concept out
20 of your mind. The only standard you should consider in your
21 deliberations is the preponderance of the evidence.

22 Preponderance of the evidence means that a plaintiff
23 must prove, in light of all the evidence, that what it claims
24 is more likely true than not true. To say it differently, if
25 you were to put the evidence favorable to Winn-Dixie on one

1 side of a scale, and the evidence favorable to the Defendants
2 on the other side of the scale, Winn-Dixie must have its side
3 of the scale tipped downwards. If you find, after considering
4 all of the evidence, that a claim or fact is more likely so
5 than not so, or in other words, that side of the scale would
6 tip slightly downwards, then that claim, or fact has been
7 proven by a preponderance of the evidence. If you find, after
8 considering all of the evidence, that Plaintiff has failed to
9 meet its burden, either because the scales weigh in favor of
10 Defendants, or the scales do not tip in favor of either
11 Plaintiff or Defendants, the verdict must be for Defendants.

12 In determining whether any fact has been proven by a
13 preponderance of the evidence, you may, unless otherwise
14 instructed, consider the testimony of all witnesses, regardless
15 of whether the Plaintiff or Defendants called it, and all
16 exhibits received in evidence, regardless of who may have
17 produced them. The evidence from which you are to find the
18 facts consists of the following. The testimony of the
19 witnesses, including the testimony presented via video
20 deposition, documents, and other things received as exhibits,
21 and stipulated facts that have been agreed to by the parties.

22 The following things are not evidence, statements of
23 the lawyers, including opening and closing statements, as well
24 as any remarks while they examine witnesses, arguments and
25 questions of the lawyers, even if the lawyers' questions

1 sounded like they were based on facts. What the lawyers said
2 is not evidence, unless I told you specifically you consider it
3 so. This even includes those times when lawyers may have said
4 they were summarizing testimony. So, if you remember the
5 evidence differently from the attorneys, you should rely on
6 your recollection. Objections by lawyers, even if their
7 objections sounded as though they were based on something
8 sounding like facts are not evidence. Any testimony I told you
9 to disregard, or which I excluded from evidence. Anything you
10 may have seen or heard about this case outside of the
11 courtroom. You must make your decision based only on the
12 evidence that you saw and heard in Court. Do not let rumors,
13 suspicions, or anything else that you may have seen or heard
14 outside of Court influence your decision in any way.

15 You can and should use your common sense in weighing
16 the evidence. Consider the evidence in light of your everyday
17 experience with people and events and give it whatever weight
18 you believe it deserves. So, if your experience tells you that
19 certain evidence reasonable leads to a conclusion, you are free
20 to reach that conclusion. There are rules that control what
21 can be received into evidence. When a lawyer asked a question
22 or offered an exhibit into evidence, and a lawyer on the other
23 side thought that it was not permitted by the rules of
24 evidence, that lawyer may have objected. Indeed, you heard
25 plenty of objections in this trial.

1 Objections simply mean that the lawyer was requesting
2 that I make a decision on a particular pool of evidence.
3 Objections to questions, whether short or lengthy, are not
4 evidence. Lawyers have an obligation to their clients to make
5 objections when they believe that the evidence being offered is
6 improper under the rules of evidence. Sometimes they are
7 right. Sometimes they are not. You should not be influenced
8 by the fact that there was an objection. If the objection was
9 sustained, you are to ignore the question and any whole or
10 partial answer to it. If the objection was overruled, treat
11 the answer like any other.

12 Also, if certain testimony or other evidence was
13 ordered struck from the record, you must disregard that
14 evidence. Do not consider any testimony or other evidence that
15 was excluded. Do not speculate about what a witness might have
16 said, or what an exhibit might have shown. At times, I
17 instructed you that you could only consider certain evidence
18 for a particular limited purpose. In particular, I told you
19 that with respect to the EMMC Noncompete Policy, you must only
20 assess whether the existence of the noncompete, as well as the
21 EMMC's purpose for implementing it makes it more likely that
22 the EMMC also adopted the Minimum Pricing Policy and / or
23 Target pricing. You must follow that instruction and may only
24 consider that evidence for that limited purpose. It may not be
25 used for any other purpose.

1 There are two types of evidence that you may use in
2 reaching your unanimous verdict. One type of evidence is
3 called direct evidence. An example of direct evidence is when
4 a witness testifies about something that the witness knows
5 through his or her own senses. Something the witness has seen,
6 felt, touched, heard, or did. If a witness testified that she
7 saw it raining outside, and you believed her, that would be
8 direct evidence that it was raining.

9 The other type of evidence is circumstantial evidence.
10 Circumstantial evidence is proof of one or more facts from
11 which you could find another fact. If someone walked in the
12 courtroom wearing a raincoat covered with drops of water and
13 carrying a wet umbrella, that would be circumstantial evidence
14 from which you could conclude that it was raining. You should
15 consider both kinds of evidence that are presented to you. The
16 law makes no distinction in the weight to be given to either
17 direct or circumstantial evidence. You are to decide how much
18 weight to give any evidence.

19 In deciding what the facts are, you may have to decide
20 what testimony you believe and what testimony you do not
21 believe. You are the sole judges of the credibility of the
22 witnesses. Credibility means whether a witness is worthy of
23 belief. You may believe everything a witness says, only part
24 of it, or none of it. In deciding what to believe, as I
25 mentioned to you at the start of the trial, you may consider a

1 number of factors, including the following: The opportunity
2 and ability of a witness to see, or hear, or know the things
3 the witness testifies to; the quality of the witness's
4 understanding and memory; the witness's manner while
5 testifying; whether the witness has an interest in the outcome
6 of the case, or any motive, bias, or prejudice; whether the
7 witness is contradicted by anything the witness said or wrote
8 before trial, or by other evidence; how reasonable the
9 witness's testimony is when considered in the light of other
10 evidence that you believe; and any other factors that bear on
11 believability.

12 The weight of the evidence to prove a fact does not
13 necessarily depend on the number of witnesses who testify.
14 What is more important is how believable the witnesses were,
15 and how much weight you think their testimony deserves. In
16 fact, you may find that testimony of a small number of
17 witnesses, or even one witness alone, as to any fact is more
18 credible than the testimony of a larger number of witnesses to
19 the contrary.

20 Inconsistencies or discrepancies in the testimony of a
21 witness, or between different witnesses, may or may not cause
22 you to discredit certain testimony. Two or more people
23 experiencing an event may see or hear it differently.
24 Similarly, just because a witness makes a mistake does not mean
25 that a witness was not telling the truth. People may tend to

1 forget things or remember things inaccurately. In this case,
2 some of these events occurred 15 to 20 years ago. You should
3 not forget to use your commonsense when evaluating the
4 testimony.

5 In weighing the effect of a discrepancy or mistake,
6 you should consider whether it pertains to a matter of
7 importance, or an unimportant detail, and whether the
8 discrepancy results from innocent error or lapse in memory, as
9 opposed to an intentional falsehood. Give the testimony of
10 each witness such weight, if any, that you think -- that you
11 may think it deserves. In short, you may accept or reject the
12 testimony of any witness, in whole or in part.

13 As I mentioned a few moments ago, one of the types of
14 evidence you may consider is deposition testimony. Deposition
15 is the sworn testimony of a witness taken before trial. The
16 witness is placed under oath and swears to tell the truth. And
17 lawyers for each party may ask questions. A court reporter is
18 present and records the questions and answers. We watched
19 several videos of depositions of certain witnesses who were not
20 able to testify at the trial in person. The deposition
21 testimony you viewed is entitled to the same consideration and
22 is to be judged in the same way as if the witness had been
23 present to testify at this trial in person.

24 You've heard testimony containing opinions from three
25 individuals in this case, Dr. Keith Leffler for the Plaintiff,

1 Dr. David Beyer and Dr. Jesse David for the Defendants.
2 Opinion testimony is testimony from a person who has a special
3 skill or knowledge in a scientific or professional field.
4 Their skill or knowledge is not common to the average person,
5 but it has been acquired through their study, training, and /
6 or experience. As a result, we refer to them as experts during
7 this trial. But their testimony should be judged just like any
8 other testimony. It is your obligation to determine their
9 expertise, as well as the credibility and reliability of their
10 testimony. The testimony of these witnesses is sometimes in
11 conflict. That is, they disagree at times.

12 You must remember that you are the sole trier of the
13 facts. And where their testimony relates to a question of
14 fact, it is your job to resolve the disagreements. The way you
15 resolve the conflict between these witnesses is the same way
16 that you decide other fact questions, and the same way that you
17 decide whether to believe ordinary witnesses. In weighing
18 opinion testimony, you may consider a witness's qualifications,
19 the reasons for their opinions, the soundness of their
20 opinions, and the reliability of the information, assumptions,
21 and data supporting their opinions.

22 You may also consider the other factors I have
23 mentioned for weighing testimony of any other witness who
24 provided non-opinion testimony. The opinions of these
25 witnesses should receive whatever weight and credit, if any,

1 you think is appropriate, given all the other evidence in this
2 case. Whether a witness's opinion relies on assumptions or
3 mathematical models to arrive at his conclusions, you may
4 consider whether the witness has properly justified the
5 validity of those assumptions or mathematical models. You may
6 also consider any bias that the witness has, including any bias
7 that might arise from evidence that they have been or will paid
8 for reviewing this case and testifying.

9 You should not permit a witness's opinion testimony to
10 be a substitute for your own reason, judgment, and commonsense.
11 You may reject the testimony of any opinion witness in whole or
12 in part, if you conclude the reasons given in support of an
13 opinion are unsound or if you, for other reasons, do not
14 believe the witness. The determination of the facts in this
15 case rest solely with you.

16 As you have heard, this case involves corporations,
17 partnerships, unincorporated associations, and similar business
18 entities. You should consider and decide this case as a
19 dispute between persons of equal standing, or of equal worth in
20 the community, and holding the same or similar stations in
21 life. A corporation, partnership, or unincorporated
22 association, or similar entity is entitled to the same fair
23 trial as a private individuals. All persons, including
24 corporations, partnerships, unincorporated associations, and
25 other organizations stand equal before the law and are to be

1 treated as equals. The size or profitability of a company or
2 corporations is irrelevant to the rights and obligations under
3 the law. Therefore, you should consider and decide this case
4 as a dispute between persons of equal standing in the community
5 of equal worth, and holding the same or similar stations in
6 life.

7 Under the law, a corporation and association or
8 similar body is a person. But it acts only through its agents.
9 Agents for such an organization include its directors,
10 officers, employees, or others acting on its behalf. A
11 corporation is not capable under the law of conspiring with its
12 own agents, unincorporated divisions, or its wholly owned
13 subsidiaries. Through its agents, however, such an
14 organization is capable of conspiring with other outside
15 persons or independent organizations.

16 A corporation or other such organization is legally
17 bound by the acts and statements of its agents done or made
18 within the scope of the agent's employment or apparent
19 authority. Acts done within the scope of employment are those
20 performed on behalf of the corporation and directly related to
21 the performance of the duties the agent has general authority
22 to perform. Apparent authority is the authority that persons
23 outside the corporation could reasonably believe the agent
24 would have judging from his or her position with the
25 organization, the responsibilities previously entrusted to the

1 person or the office, and the circumstances surrounding his or
2 her past conduct.

3 To summarize, for a corporation to be legally
4 responsible for the acts or statements of its agents, you must
5 find that the agent was acting within the scope of his or her
6 employment with actual or apparent authority. Again, an
7 organization is entitled to the same fair trial as a private
8 individual. Its acts are to be judged by the same standard as
9 the acts of a private individual, and you may hold an
10 organization liable only if such liability is established by
11 the preponderance of the evidence. Once again, that is because
12 all persons, including corporations, are equal before the law.

13 Plaintiff's claim arises under § 1 of a federal law
14 called the Sherman Act. The purpose of the Sherman Act is to
15 preserve free and unfettered competition in the marketplace. §
16 1 of the Sherman Act prohibits contracts, combinations, and
17 conspiracies that unreasonably restrain trade. Such a
18 restraint must affect interstate commerce. I'm instructing you
19 that the interstate commerce requirement has already been met,
20 and therefore, you need not consider that requirement in your
21 deliberations.

22 Accordingly, you'll be asked to answer the following
23 questions. Was there a contract, combination, or conspiracy
24 between or among at least two separate entities? Two, did that
25 contract, combination, or conspiracy unreasonably restrain

1 trade? Three, did the contract, combination, or conspiracy
2 cause Plaintiff to suffer an injury to its business or property
3 by paying higher prices than it would have paid without the
4 contract, combination, or conspiracy? If you answer yes to
5 these questions, you will also determine the proper amount of
6 damages to award the Plaintiff. I will instruct you on damages
7 later on.

8 In order to prove a relevant contract, combination, or
9 conspiracy, Plaintiff must prove the following by a
10 preponderance of the evidence. One, an alleged contract,
11 combination, or conspiracy existed. Two, a Defendant knowingly
12 became a member of the conspiracy. To act knowingly means to
13 participate deliberately and not because of a mistake or
14 accident. The basis of a conspiracy is an agreement or
15 understanding between two or more persons or entities. An
16 agreement or understanding between two or more persons or
17 entities exists when they share a commitment to a common
18 scheme. A written agreement or contract may satisfy the
19 contract, combination, or conspiracy element of a § 1 claim
20 under the Sherman Act.

21 But to establish the existence of a conspiracy, the
22 evidence need not show that its members entered into any formal
23 or written agreement. The agreement, itself, may have been
24 entirely unspoken. A person can become a member of a
25 conspiracy without full knowledge of all the details of the

1 conspiracy, the identity of all its members, or the parts such
2 members played in the charged conspiracy. The members of the
3 conspiracy need not, necessarily, have met together, directly
4 stated what their object or purpose was to one another, or
5 stated the details or means by which they would accomplish
6 their purpose.

7 But to prove a conspiracy existed, the evidence must
8 show that the alleged members of the conspiracy came to an
9 agreement or understanding among themselves to accomplish a
10 common purpose. A conspiracy may be formed without all parties
11 coming to an agreement at the same time, such as where parties
12 separately accept invitations to participate in a place to
13 restrain trade at different times.

14 Similarly, it is not essential that all persons act
15 exactly alike, nor is it necessary they all possess the same
16 motive for entering the agreement. It is also not necessary
17 that all the means or methods claimed by Plaintiff were agreed
18 upon to carry out the alleged conspiracy, nor that all of the
19 means or methods that were agreed upon were actually used or
20 put into operation, nor that all the persons alleged to be
21 members of the conspiracy were actually members. It is the
22 agreement or understanding to restrain trade within the meaning
23 of § 1 of the Sherman Act that constitutes a conspiracy,
24 regardless of whether the conspiracy actually succeeded or
25 failed.

1 Plaintiff may prove the existence of the alleged
2 conspiracy through direct evidence, circumstantial evidence, or
3 both. As I mentioned earlier, direct evidence is explicit and
4 requires no inferences to establish the existence of the
5 alleged conspiracy. Direct evidence of an agreement may not be
6 available, and therefore, a conspiracy also may be shown
7 through circumstantial evidence. You may infer the existence
8 of a conspiracy from the circumstances, including what you find
9 the alleged members actually did and the words they used. Mere
10 similarity of conduct among various persons, however, of the
11 fact that they may have associated with one another, and may
12 have met or assembled together, does not, by itself, establish
13 the existence of a conspiracy.

14 If they acted similarly but independently of one
15 another, without any agreement among them, then there would not
16 be a conspiracy. In determining whether an agreement or
17 understanding between two or more persons has been proved, you
18 must view the evidence as a whole, and not piecemeal. If you
19 find that Plaintiff has proven by a preponderance of the
20 evidence that there was an overarching conspiracy to charge
21 supercompetitive prices, then you must determine which
22 Defendants, if any, were members of that conspiracy. If you
23 find that Plaintiff has failed to prove by a preponderance of
24 the evidence that there was an overarching conspiracy to charge
25 supercompetitive prices, then you must find in Defendants favor

1 on this claim. And you must discontinue any further evaluation
2 of Plaintiff's alleged claim.

3 Before you can find that any given Defendant was a
4 member of the conspiracy alleged by the Plaintiff, the evidence
5 must show that this particular Defendant knowingly joined in
6 the unlawful plan at its inception or at some later time with
7 the intent to further the purpose of the conspiracy. To act
8 knowingly means to participate deliberately, not because of
9 mistake or accident. A person may become a member of a
10 conspiracy without full knowledge of all the details of a
11 conspiracy, the identity of all its members, or the parts they
12 played. Knowledge of the essential nature of a plan is enough.

13 On the other hand, a person who has no knowledge of
14 the conspiracy but happens to act in a way that helps the
15 conspiracy succeed does not thereby become a conspirator. The
16 mere fact that a particular Defendant may have engaged in
17 certain actions that were consistent with the overall
18 conspiracy alleged by the Plaintiff does not necessarily mean
19 that this Defendant acted knowingly in joining a conspiracy.
20 There are several Defendants in this case. You must decide the
21 case as to each Defendant, separately, even though there are
22 multiple Defendants, and some of the evidence and issues may be
23 common across Defendants.

24 In determining whether the Defendant was a member of
25 the alleged conspiracy, you should consider only the evidence

1 about that particular Defendant's statements and conduct,
2 including any evidence of that Defendant's knowledge and
3 participation in the events involved, and any other evidence of
4 that particular Defendant's participation in the conspiracy
5 alleged. You may not find that a Defendant was a member of a
6 conspiracy based only on its association with or knowledge of
7 wrongdoing. However, this is a factor you may consider in
8 order to determine whether a Defendant was a member of the
9 alleged conspiracy.

10 If you find that Plaintiff has proven that a Defendant
11 acted knowingly, or with intent to further the conspiracy, then
12 you should continue to evaluate the remainder of Plaintiff's
13 alleged claim as to that Defendant. If you find the Plaintiff
14 has failed to prove that one or more Defendant's acted
15 knowingly or with intent to further the conspiracy, then you
16 must find in the Defendant's favor on that claim as to that
17 Defendant, and you must discontinue any further evaluation of
18 Plaintiff's alleged claim as to that Defendant.

19 If you find that the alleged unlawful contract,
20 combination, or conspiracy existed, then unless the Court has
21 instructed otherwise, the acts and statements of the
22 participants in that contract, combination, or conspiracy are
23 binding on all other participants you find to have knowingly
24 joined the contract, combination, or conspiracy. A person who
25 knowingly joins an existing conspiracy, or who participates

1 only in part of a conspiracy with knowledge of the overall
2 conspiracy is just as responsible as if he or she had been one
3 of those who formed or began the conspiracy and participated in
4 every part of it.

5 Member of a conspiracy may withdraw from the
6 conspiracy. To find that a member of a conspiracy has
7 withdrawn from or abandoned the conspiracy, the evidence must
8 show that a Defendant, one, undertook affirmative steps
9 inconsistent with the object of the conspiracy to disavow or
10 defeat the goal or purposes of the conspiracy, and two, acted
11 in a manner reasonably calculated to notify coconspirators that
12 it was no longer participating in the conspiracy. Mere
13 inactivity in the conspiracy is not proof of withdraw.
14 Furthermore, even if a Defendant tells others of its intention
15 to withdraw, it is not withdrawn if it continues to act in
16 furtherance of the object of the conspiracy.

17 If you have concluded that a Defendant was a member of
18 a conspiracy, that Defendant bears the burden of proving by a
19 preponderance of the evidence that it withdrew from the
20 conspiracy. There must be evidence of some affirmative act of
21 withdraw. I'm instructing you now that if you find United
22 Mushroom Farm Cooperative, Inc. joined the alleged conspiracy,
23 then you must find that it withdrew from the alleged conspiracy
24 as of August 31, 2005.

25 There are three Defendants who allege they withdrew

1 from the conspiracy. It is up to you to determine whether they
2 have satisfied their burden of showing by a preponderance of
3 the evidence that they withdrew. Those Defendants are Gino
4 Gaspari and Sons, Inc., Monterey Mushrooms, Inc., and Oakshire
5 Mushroom Farm, Inc. If you find that a party has withdrawn
6 from a conspiracy, you must then determine the extent of the
7 damages for which that party may be liable. A party that
8 withdraws from a conspiracy is liable for damages flowing from
9 its conduct, and the conduct of its coconspirators, while it
10 was a member of the conspiracy, even if the damages occurred
11 after its withdraw. As long as the conduct occurred before its
12 withdraw, and the conduct caused damages that occurred after
13 withdraw. Plaintiff has the burden of proving what portion of
14 damages are attributable to acts of the conspiracy prior to a
15 Defendant's withdraw.

16 Not every contract combination or conspiracy violates
17 § 1 of the Sherman Act. There are two different tests for you
18 to determine whether a contract, combination, or conspiracy
19 violates § 1 of the Sherman Act. The test you will be applying
20 in this case is called The Rule of Reason. I will instruct you
21 now on this test.

22 Plaintiff's claim alleges that Defendants engaged in
23 an overarching conspiracy to raise the price of agaricus
24 mushrooms through circulating minimum and / or target price
25 lists or by acquiring properties that were historically used

1 for mushroom farming to reduce or limit the supply of fresh
2 agaricus mushrooms. These activities must be part of a single
3 overarching conspiracy as opposed to two different and
4 independent conspiracies. To prevail on this claim, Plaintiff
5 must show that a Defendant entered into a single overarching
6 conspiracy with two aspects. One, circulation of minimum or
7 target prices lists along with rules and regulations requiring
8 EMMC members to charge those prices, and two, acquiring
9 properties that were historically used for mushroom farming to
10 reduce or limit the supply of fresh agaricus mushrooms,
11 including by placing deed restrictions on the properties to
12 prevent their future use as mushroom farm.

13 Plaintiff must show by a preponderance of the evidence
14 that each Defendant joined the alleged conspiracy, that the
15 conspiracy was anticompetitive by depriving the marketplace of
16 competition and resulting in prices higher than they would have
17 otherwise been, and that Winn-Dixie was injured by the
18 conspiracy. To determine whether these alleged restraints
19 constitute one conspiracy, you must look to one, whether there
20 was a common goal among the conspirators. And two, whether
21 their agreement contemplated bringing to pass a continuous
22 result that will not continue without the continuous
23 cooperation of conspirators. And three, the extent to which
24 the participants overlap in the various dealings. If, after
25 considering these factors, you find that these alleged

1 restraints are part of the same conspiracy, only then must you
2 determine if the actions taken were reasonable or unreasonable.
3 There are a number of steps to this inquiry, which I will first
4 summarize before going into detail.

5 If you find such an overarching conspiracy, you will
6 be asked to determine whether the restraint was unreasonable.

7 Under the Rule of Reason, you must decide whether the
8 Defendants overarching conspiracy I just described unreasonably
9 restrained trade. This involves a multistep analysis, which I
10 will outline briefly now, and explain in more detail.

11 Initially, you must determine whether Plaintiff has
12 proven that the challenged restraint resulted in a substantial
13 harm to competition in a relevant product and geographic
14 market. If you find that Plaintiff has proven that the
15 challenged restraint results in a substantial harm to
16 competition in a relevant market, then you must consider
17 whether the restraint reduces countervailing competitive
18 benefits. If you find that it produces countervailing
19 competitive benefits, then you must balance the competitive
20 harm against the competitive benefit. The challenge restraint
21 is illegal under § 1 of the Sherman Act, only if you find that
22 the competitive harm substantially outweighs the competitive
23 benefit.

24 As I just mentioned, in order to prove a challenged
25 restraint is unreasonable, the Plaintiff must demonstrate that

1 the restraint resulted in substantial harm to competition in a
2 relevant market. Harm that occurs merely to the Plaintiff's
3 individual business is not sufficient, by itself, to
4 demonstrate harm to competition generally. Rather, harm to
5 competition must be shown in a broader market, called the
6 relevant market. There are two aspects of a relevant market.
7 One, a relevant product market, and two, a relevant geographic
8 market. It is Plaintiff's burden to prove the existence of a
9 relevant market for restraints evaluated under the Rule of
10 Reason. I will now explain the definitions of relevant product
11 and relevant geographic markets.

12 One common way to think about the relevant product
13 market is whether various products are interchangeable for one
14 reason or another, or whether they are considered substitutes
15 for one another. If they are, then it is likely they are part
16 of a single product market. Products need not be identical or
17 precisely interchangeable, as long as they are reasonable
18 substitutes. To determine whether products are reasonable
19 substitutes for one another, you must consider whether a small
20 insignificant and nontransitory increase in the price of one
21 product would result in enough customers switching from that
22 product to another product such that the price increase would
23 not be profitable. In other words, would customers accept the
24 price increase and continue buying the original product or will
25 so many switch to alternative products that the price increase

1 will be withdrawn?

2 If you find that customers would switch to alternative
3 products and the price increase would not be profitable, you
4 must conclude the products are in the same product market. If,
5 on the other hand, you find that customers would not switch,
6 then you must conclude that the two products are not in the
7 same product market. In this case, Plaintiff contends the
8 relevant product market is fresh agaricus mushrooms sold only
9 to fresh customers. Defendants argue that Plaintiff failed to
10 prove a proper relevant product market because it did not
11 account for agaricus mushrooms of fresh market quality that was
12 sold to non-fresh customers, such as processors.

13 The relevant geographic market is a given geographic
14 area where the Plaintiffs must show harm. Plaintiff has the
15 burden of proving a relevant geographic market exists by a
16 preponderance of the evidence. Plaintiff claims the relevant
17 geographic market is the entire nonwestern United States.
18 Defendant asserts the market is actually made up of a series of
19 regional markets. If you find that Plaintiff has proven a
20 relevant product and geographic market, you should continue to
21 evaluate the remainder of Plaintiff's claim. If you find that
22 Plaintiff has not proven a relevant product or geographic
23 market, you should find in favor of Defendants on this claim
24 and discontinue further evaluation of this claim.

25 To prove that the challenge restraint is unreasonable,

1 Plaintiff must demonstrate that it has resulted in substantial
2 harm to competition. As I mentioned earlier, harm that occurs
3 merely to the individual business of a Plaintiff is not
4 sufficient by itself to demonstrate harm to competition
5 generally. Rather, harm to competition must be shown in the
6 relevant market.

7 In this case, because the alleged restraint evaluated
8 under the Rule of Reason includes minimum and target prices,
9 coupled with a supply control program, a harmful effect on
10 competition refers to a reduction in competition with respect
11 to mushroom prices that results in higher prices than there
12 would have been absent these restraints. If the challenged
13 conduct has not resulted in prices higher than the competitive
14 level, then there has been no competitive harm, and you should
15 find that the challenged conduct was not unreasonable.

16 The Plaintiff can satisfy its burden either by
17 directly proving the existence of an actual anticompetitive
18 effect in a relevant market. In this case, higher mushroom
19 prices than there would have been without the restraint, or by
20 proving the Defendants had market power in the relevant market.
21 In determining whether the challenged conduct has produced
22 competitive harm, you may look at the following factors: The
23 effect of the restraint on prices, output, product quality, and
24 service; the purpose and nature of the restraint; the nature
25 and structure of the relevant market; the number of competitors

1 in the relevant market, and the level of competition among
2 them, both before and after the restraint was imposed; any
3 facts unique to the fresh agaricus mushroom industry; and
4 whether a Defendant and its alleged coconspirators, together,
5 possessed market power. The last factor, market power, has
6 been defined as an ability to profitably raise prices for a
7 sustained period of time above those that would be charged in a
8 competitive market.

9 A firm or firms that possess market power, generally,
10 can charge higher prices for the same goods and services than a
11 firm in the same market that does not possess market power.
12 The ability to charge higher prices for better products or
13 services, however, is not market power. An important factor in
14 determining whether a Defendant possess market power is the
15 Defendant's market share, that is, it's percentage of the
16 products or services sold in the relevant market by all
17 competitors. If Defendants do not possess a substantial market
18 share, it is less likely that Defendants possess market power.
19 If Defendants do not possess market power, it is less likely
20 that the challenged restraint has resulted in a substantial
21 harmful effect on competition in the market.

22 If you find that Plaintiff has proven that the
23 challenged restraints resulted in substantial harm to
24 competition in a relevant market, you must determine whether
25 the restraint also benefits competition in other ways. The

1 Defendants bear the burden of showing procompetitive benefits.
2 In considering whether the challenged restraint benefitted
3 competition, you may consider various factors, including but
4 not limited to increase production, increased consumer choice,
5 increased service, decreased prices, or improved product
6 quality. You may not consider increased producer prices,
7 increase producer profits, decreased producer losses, or
8 helping firms stay in operation as procompetitive benefits.

9 If you find that the challenged restraints results in
10 competitive benefits, then you also must consider whether the
11 restraint was reasonably necessary to achieve the benefits. If
12 the Plaintiff proves that the same benefits could have been
13 readily achieved by other reasonably available alternative
14 means that creates substantially less harm to competition, then
15 those claimed benefits cannot be used to justify the
16 restraints.

17 If you find that the challenged restraint was
18 reasonably necessary to achieve competitive benefits, then you
19 must balance those competitive benefits against the competitive
20 harm resulting from the same restraint. If the competitive
21 harm substantially outweighs the competitive benefits, then the
22 challenged restraint is unreasonable. If the competitive harm
23 does not substantially outweigh the competitive benefits, then
24 the challenged restraint is not unreasonable.

25 In conducting this analysis, you must consider the

1 benefits and harm to competition and consumers, not just to a
2 single competitor or group of competitors. The Plaintiff bears
3 the burden of proving that the anticompetitive effect of the
4 conduct substantially outweighs its benefits. If you find that
5 Plaintiff has proven the anticompetitive effects of the conduct
6 substantially outweighs the procompetitive benefits, you should
7 find in favor of the Plaintiff. If you find that Plaintiff has
8 failed to prove the anticompetitive effects of conduct
9 substantially outweigh the procompetitive benefits, you must
10 find in Defendant's favor.

11 Under the Sherman Act, it is not a defense that
12 Defendants may have acted with good motives, thought their
13 conduct was legal, or that the conduct may have some good
14 results. During this trial, you have heard discussion of the
15 Eastern Mushroom Marketing Cooperative, or EMMC, which is a
16 cooperative organization. Business that are actual or
17 potential competitors, such as the Defendants here, may
18 lawfully form into associations to advance common interests.
19 They may also meet and communicate with one another in
20 furtherance of lawful activities. For example, trade
21 associations may keep members informed of new services or
22 technology in the industry, or perform other valuable services,
23 such as cooperative research, publication of trade journals, or
24 joint representation before legislative or administrative
25 bodies.

1 However, an association is capable of committing
2 violations of the antitrust laws. The actions of a group of
3 competitors taken through an association to which they belong
4 present the same issues as the actions of a group of
5 competitors who have not created a formal organization, such as
6 a trade association. A trade association, or similar industry
7 group, cannot lawfully act to raise, stabilize, or maintain
8 prices in the market in which its members compete with one
9 another, or to reduce members collective output of products or
10 services. These activities constitute an agreement between the
11 association and its members in violation of the Sherman Act,
12 even if the association has not conspired with a nonmember.
13 Under these circumstances, the trade association or industry
14 group is one of the coconspirators or participants in the
15 unlawful agreement.

16 A business that belongs to a trade association does
17 not become liable for violating the antitrust laws simply
18 because the trade association is liable for such violation.
19 Instead, Plaintiff must prove that the member of the trade
20 association knew of and participated in the conduct you find
21 unlawful. Identification of a particular Defendant's
22 membership or role in the organization is not sufficient to
23 show that a particular Defendant agreed to the conspiracy,
24 itself.

25 The Plaintiff contends that all Defendants engaged in

1 similar conduct, namely setting prices in accordance with
2 prices set forth in a series of price lists. The Plaintiff
3 further contends that this conduct, when considered with other
4 evidence, shows that a conspiracy existed among all Defendants.
5 The mere fact that certain Defendants may have raised prices
6 simultaneously does not, by itself, establish the existence of
7 a conspiracy among Defendants. Their behavior may be no more
8 than a result of exercise of independent judgment in response
9 to identical or similar market conditions. For example,
10 everyone might open their umbrellas on a rainy day. But that
11 similar behavior would not necessarily mean they had agreed or
12 conspired to open their umbrellas.

13 Moreover, under certain conditions, a business may
14 lawfully adopt the same prices, conditions of sale, or other
15 practices as its competitors, as long as it does so
16 independently, and not as part of an agreement or understanding
17 with one or more of its competitors. If Defendants acted
18 similarly but independently of one another, without any
19 agreement or understanding between two or more of them, there
20 would not be a conspiracy. You must decide whether each
21 individual Defendants allegedly similar conduct was more
22 probably than not the result of an agreement or understanding
23 among them. In doing so, you may consider the conduct of each
24 individual Defendant, along with other evidence. You cannot
25 infer that a conspiracy existed unless you find that the

1 evidence, when viewed as a whole, make it more likely than not
2 that the Defendants had an agreement or understanding with one
3 another to engage in unlawful conduct, as I have explained, as
4 opposed to acting independently of one another.

5 In making this determination, you should consider the
6 similar conduct against the entire background in which it took
7 place. The evidence, when viewed all together, must satisfy
8 you that it is more likely that Defendants similar actions were
9 the product of an agreement or understanding with one another,
10 and their own independent decisions. If, after considering all
11 the evidence, you conclude that Plaintiff showed by a
12 preponderance of the evidence as to a given Defendant that the
13 Defendant's similar conduct was the product of an agreement or
14 understanding with other Defendants, rather than its own
15 independent decision, you must find for Plaintiff on the
16 question of whether that Defendant participated in a
17 conspiracy. However, if you find that Plaintiff has failed to
18 satisfy its burden of proof as to each Defendant, that the
19 Defendant -- let me start again.

20 However, if you find that Plaintiff has failed to
21 satisfy its burden of proof as to each Defendant, that the
22 Defendant participated in a conspiracy, you must return a
23 verdict for that Defendant. If you find that Plaintiff
24 satisfied its burden of proof with respect to its claim against
25 any Defendants, you must also decide whether Plaintiff is

1 entitled recover any damages from those particular Defendants.
2 Plaintiff cannot recover any damages for an injury to its
3 business or property from any Defendant unless Plaintiff first
4 establishes three elements of injury and causation. One,
5 Plaintiff was, in fact, injured as a result of Defendants
6 alleged violation of the antitrust laws. Two, a Defendant's
7 alleged illegal conduct was a material cause of Plaintiff's
8 injury. And three, Plaintiff's injury is an injury of the type
9 that the antitrust laws were intended to prevent. I will now
10 explain each of these elements.

11 The first element is sometimes referred to as injury
12 in fact or fact of damage. For the Plaintiff to establish that
13 it's entitled to recover damages, it must prove that it was
14 injured as a result of Defendant's alleged violation of the
15 antitrust laws. This requires that Plaintiff proves that it
16 was in fact injured by a Defendant's alleged antitrust
17 violation, but it does not require that Plaintiff prove the
18 exact dollar amount of its injury. If you find that Plaintiff
19 has established by a preponderance of the evidence that it was,
20 in fact, injured, you may then consider the amount of
21 Plaintiff's damages, if any. If you find that Plaintiff has
22 failed to prove by a preponderance of the evidence that it was
23 injured by any Defendant's alleged antitrust violation, you
24 cannot consider the amount of any damages, and you must return
25 a verdict in favor of Defendants. It is important to

1 understand that injury and amount of damage are different
2 concepts and that you cannot consider the amount of damage
3 unless and until you have concluded that the Plaintiff has
4 established that they were, in fact, injured.

5 Next, Plaintiff must also establish by a preponderance
6 of the evidence that Defendants' alleged illegal conduct was a
7 material cause of Plaintiff's injury. This means that
8 Plaintiff must prove that it suffered some injury as a result
9 of the alleged antitrust violation and not some other cause.
10 Plaintiff is not required to prove that the alleged antitrust
11 violation was the sole cause of its injury, nor need Plaintiff
12 eliminate all other possible causes of its injury. It is
13 enough if Plaintiff has proven that the alleged antitrust
14 violation was a material cause of its injury.

15 Finally, Plaintiff must establish that its injury is
16 the type of injury that the antitrust laws were intended to
17 prevent. This is sometimes referred to as antitrust injury.
18 If Plaintiff's injuries were caused by a reduction in
19 competition, acts that would lead to a reduction in
20 competition, or acts that would otherwise harm competition or
21 consumers, then Plaintiff's injuries are antitrust injuries.
22 For example, if the injury suffered by the Plaintiff is the
23 price it paid for mushrooms being higher than it would have
24 been absent the unlawful restraint, then that would constitute
25 antitrust injury. On the other hand, if Plaintiff's injuries

1 were caused by heightened competition, the competitive process,
2 itself, or by acts that would benefit consumers, then
3 Plaintiff's injuries are not antitrust injuries, and Plaintiff
4 may not recover damage for those injuries under the antitrust
5 laws. In summary, if Plaintiff can establish that it was, in
6 fact, injured by a Defendant's conduct, that Defendant's
7 conduct was a material cause of Plaintiff's injury, and that
8 the injury was the type of injury that the antitrust laws were
9 intended to prevent, then Plaintiff is entitled to recover
10 damages for the injury to its business or property.

11 Damages are the amount of money you may award to
12 Plaintiff because of Defendants' violation of the antitrust
13 laws. If you reach a verdict for the Defendants and determine
14 they did not violate the antitrust laws, you should not
15 consider the issue of damages, and you may disregard the
16 damages instruction that I am about to give. If, however, you
17 find that any Defendants violated the antitrust laws, and that
18 this violation caused injury to the Plaintiff, then you must
19 determine the amount of damages, if any, Plaintiff is entitled
20 to recover. The fact that I'm giving you instructions
21 concerning the issue of Plaintiff's damages does not mean that
22 I believe Plaintiff should or should not prevail in this case.

23 The law provides that Plaintiff should be fairly
24 compensated for all damages to its business or property that
25 were a direct result or likely consequence of the conduct that

1 you have found to be unlawful. Antitrust damages are only
2 compensatory, meaning their purpose is to put an injured
3 Plaintiff as near as possible to the position in which it would
4 have been had the alleged antitrust violation not occurred.
5 The law does not permit you to award damages to punish a
6 wrongdoer, what we sometimes refer to as punitive damages, or
7 to deter a particular conduct in the future. Furthermore, you
8 are not permitted to award to Plaintiff an amount for
9 attorney's fees or the costs of maintaining this lawsuit.

10 In this case, Plaintiff claims that Defendant's
11 unlawfully increased prices of agaricus mushrooms above the
12 level they would have been in the absence of Defendant's
13 unlawful activity. If you determine that any Defendants
14 violated § 1 of the Sherman Act, and Plaintiff was injured as a
15 result, you must award damages of the reasonably estimated
16 extra amount that Plaintiff paid for mushrooms because of the
17 violation. In other words, the amount of damages is the
18 different between what Plaintiff actually paid and what it
19 would have paid in the absence of Defendants conduct. You must
20 not decrease Plaintiff's damages, even if it avoided harm in
21 some way. Plaintiff has the burden of proving its reasonably
22 estimated damages by the preponderance of the evidence.

23 You are permitted to make just and reasonable
24 estimates in calculating Plaintiff's damages. You are not
25 required to calculate damages with mathematical certainty or

1 precision. However, damages must have a reasonable basis in
2 the evidence and must be based on reasonable assumptions and
3 estimates. Damages may not be based on guesswork or
4 speculation. Plaintiff must prove the reasonableness of each
5 of the assumptions upon which the damages calculation is based.
6 If you find that Plaintiff has provided a reasonable basis for
7 determining damages, you may award damages based on just a
8 reasonable estimate supported by the evidence. If you find
9 that Plaintiff has failed to carry its burden of proving a
10 reasonable basis for determining damages, such that a damages
11 calculation cannot be based on evidence and reasonable
12 inferences, and can only be reached through guesswork or
13 speculation, you may either not award damages, or award nominal
14 damages not to exceed \$1.

15 Plaintiff is claiming overcharges on purchases that it
16 made directly from Defendants, as well as on purchases it made
17 from distributors allegedly related to Defendants. In
18 particular, Plaintiff claims to recover damages for purchases
19 it made from nonparty Oakshire Mushroom Sales, OMS. To recover
20 damages on purchases from a distributor allegedly related to a
21 Defendant, you must find that a distributor was owned or
22 controlled by a Defendant who was a coconspirator.

23 So, in this case, you must find that OMS was owned or
24 controlled by Oakshire Mushroom Farms, Inc., OMF, and that OMF
25 was a member of a conspiracy. OMS can be said to be owned or

1 controlled by OMF, where OMS and OMF are functionally the same
2 entity, such that there is in effect a direct sale to Winn-
3 Dixie from OMF. In other words, Plaintiff must show that OMF
4 owned or had such control over OMS that OMF can be said to have
5 set the prices for OMS's sales to Winn-Dixie. In assessing
6 whether a distributor and a Defendant have such a relationship,
7 you may consider overlapping or joint ownership, financial
8 independence, and / or joint decision making between the
9 Defendant and its distributor, whether through a corporation or
10 other business entity or individual.

11 However, under the law, two entities under common
12 control cannot conspire with one another. In other words, if a
13 Defendant makes an agreement with another entity, with which it
14 is under common control, but does not form an agreement with
15 any other entity, then that Defendant did not enter into a
16 conspiracy. In sum, Plaintiff may not recover damages based on
17 overcharges for mushrooms it purchased from OMS, unless it
18 shows by a preponderance of the evidence, one, it purchased
19 mushrooms from OMS, two, OMS was owned or controlled by OMF
20 such that they are functionally the same entity, and three, OMF
21 was a coconspirator. If you find that OMF participated in the
22 conspiracy, and that OMF and OMS are commonly owned or
23 controlled, then you may award damages based on Plaintiff's
24 purchases of mushrooms from OMF, OMS, and any other conspiracy
25 member.

1 As I discussed earlier, there are multiple Defendants
2 in this case. Each participant in an agreement or conspiracy
3 that violates the antitrust laws is jointly and severally
4 liable for all of the damages resulting from the conspiracy.
5 This means that each participant in the agreement or conspiracy
6 is fully liable for all of the damages caused by the
7 conspiracy, and not solely for damages caused by an individual
8 conspirator. One who knowingly joins an ongoing conspiracy is
9 liable for all previous acts of the other participants in the
10 agreement or conspiracy in furtherance of the conspiracy.

11 If you find that any particular Defendant was not a
12 member of the conspiracy, then that Defendant would not be
13 liable for any damages based on Plaintiff's purchases from that
14 Defendant. If you find that Plaintiff has proven the existence
15 of the alleged conspiracy, and that a Defendant participated in
16 a conspiracy, and that Plaintiff is entitled to recover damages
17 based on the other instructions in this case, then that
18 Defendant, absent withdraw, would be liable for all damages
19 caused by the conspiracy, including any overcharges paid by the
20 Plaintiff for products purchased from another participant in
21 the agreement or conspiracy.

22 If you find that a particular Defendant withdrew from
23 the conspiracy, that Defendant is no longer jointly and
24 severally liable for any damages caused by acts taken by the
25 conspiracy after the withdraw. Therefore, a special Verdict

1 Form instructs you to answer the question of which Defendants,
2 if any, you find withdrew from the conspiracy, on what date
3 those Defendants withdrew, and what portion of the damages, if
4 any, for each claim you find the Defendant jointly and
5 severally liable.

6 In calculating the total overcharge damages
7 attributable to the conspiracy, you can only consider those
8 sales on which the conspiracy was able to cause an actual
9 overcharge. If you find that a particular Defendant withdrew
10 from the conspiracy and that the conspiracy therefore no longer
11 caused an overcharge to be paid on that Defendant's sales, then
12 those sales should not be included in your calculation of the
13 total overcharge damages. A party that withdraws from a
14 conspiracy is only liable for damages flowing from its conduct
15 and the conduct of its coconspirators before it withdrew, even
16 if the damages occurred after its withdraw, as long as the
17 conduct causing the damages occurred before its withdraw.
18 Plaintiff has the burden of proving what portion of damages are
19 attributable to acts of the conspiracy prior to a Defendant's
20 withdraw.

21 Okay. I'm still here. And you're still here. So --

22 COURT OFFICER: I have the verdict sheets, jury
23 instructions, and the two (indiscernible).

24 THE COURT: I'm sending out two copies of the charge
25 for the jury, as well as the two exhibits that have been

1 admitted into evidence that there's a dispute on the dates of
2 withdraw for the jury to have in their possession. And good
3 luck. Again, if you have any questions, whoever you elected as
4 foreman, notify the Court in written.

5 What was that, an hour-and-a-half?

6 COURT OFFICER: Just about, yeah. Just under an hour-
7 and-a-half. Less.

8 THE COURT: I don't know is somebody close to the
9 microphone? All right. All right. Be seated. Usually we get
10 a question right away, so hang on.

11 COURT OFFICER: Want more water?

12 THE COURT: Yeah.

13 COURT OFFICER: Anything else?

14 THE COURT: What?

15 COURT OFFICER: Anything else?

16 THE COURT: Yes. A sedative. Thank you.

17 MR. BRUNELLI: Your Honor, may I use the restroom?

18 THE COURT: What's that?

19 MR. BRUNELLI: May I use the restroom?

20 THE COURT: Oh, sure. I don't know if anyone else
21 wants to take a break?

22 MR. AHERN: I got to go home this weekend.

23 THE COURT: Oh, that's good.

24 MR. AHERN: Yeah. Yeah.

25 THE COURT: I can tell you did. The wife wouldn't let

1 you come back here without a shave. I know.

2 MR. AHERN: Got to play double squash twice. That was
3 good.

4 THE COURT: You all have to deal with that. I did.

5 MR. AHERN: Your Honor, this is Sandy Brown
6 (phonetic), the General Counsel of Southeastern
7 (indiscernible).

8 THE COURT: Hi. Come on up. You don't have to sit
9 there. Sit at the counsel table, yeah. I mean, you're paying
10 him. You can claim whatever you want.

11 MR. BROWN: I passed the bar a couple of times, so,
12 thank you sir.

13 THE COURT: You're the General Counsel for -- did I --
14 what did I hear -- what's his title?

15 MR. AHERN: I'm sorry, Chief Legal Officer.

16 MR. BROWN: Chief Legal Officer, Southeastern Grocers,
17 Incorporated. They took me from General Counsel to Chief Legal
18 Officer so they didn't have to pay me any more money. You get
19 a new title. That should be good.

20 THE COURT: So, you're a CLO.

21 MR. BROWN: Yes. (Indiscernible).

22 THE COURT: You're the CLO Fellow. Okay.

23 (Jury out at 11:06 a.m.)

24 (Recess at 11:06 a.m., until 2:16 p.m.)

25 THE COURT: Be seated. This is a question. They want

1 Leffler and David's presentation for reference.

2 MR. AHERN: Right, and then they --

3 THE COURT: They drew a graph of some kind. Chris,
4 why don't you give them -- let them look at it and tell me what
5 they think the question is.

6 MR. DESTEFANO: Well, the question seems to be --

7 THE COURT: You don't know the question. Take a look
8 at the question.

9 MR. DESTEFANO: No, no, I looked at it already.

10 THE COURT: Oh, you looked at it already?

11 MR. DESTEFANO: Yeah.

12 THE COURT: Oh, okay.

13 MR. DESTEFANO: It seems that they're asking for the
14 PowerPoint presentations of both experts, and then they drew a
15 chart, and we're not sure whether that's just an example, or
16 whether that's just that chart, or whatever. We're not sure.
17 The problem with any of that stuff is, it did not come into
18 evidence. It was used for demonstrative purposes only and
19 we're not sure what to do, under those circumstances, if
20 anything.

21 MS. SHIELDS: I agree with Mr. DeStefano.

22 MR. AHERN: Yeah.

23 THE COURT: Clear as a bell, right?

24 MR. AHERN: Exactly. Exactly. Well, Your Honor, I
25 mean, they've clearly said it's just for reference. So I don't

1 -- I mean, and Your Honor can say that this was not admitted
2 into evidence.

3 THE COURT: That's what I mean, they have to use their
4 memory.

5 MR. AHERN: Well, but --

6 THE COURT: It wasn't admitted.

7 MR. AHERN: But if they're asking for it, you can give
8 them the instruction that it's not admitted into evidence.

9 THE COURT: Right.

10 MR. AHERN: But, in terms of what it is, it's either,
11 you know, something like this slide, or it's the scatterplot.
12 But there are a number of slides that are -- that relate to
13 Winn-Dixie prices paid. And it might be the scatterplot that
14 has --

15 THE COURT: The bottom line is, it was not admitted
16 into evidence. They have to use their best recollection.

17 MR. AHERN: Got it, I don't know that --

18 MR. DESTEFANO: I think that's (indiscernible).

19 MR. AHERN: I mean, I don't think -- I mean, these
20 types of things -- none of these types of things are ever
21 admitted into evidence, I don't think, in cases like this.

22 THE COURT: Well, that's not true. I've had trials
23 where things were -- charts and everything were admitted into
24 evidence.

25 MR. AHERN: Okay.

1 THE COURT: In fact, the one about who resigned, and
2 so on --

3 MR. AHERN: Right.

4 THE COURT: -- was admitted into evidence and that was
5 a chart.

6 MR. DESTEFANO: Right.

7 THE COURT: So --

8 MR. AHERN: Your Honor, we would say that, if they've
9 asked for it for reference, then they can be provided to with
10 the limiting instruction.

11 THE COURT: And what, this is for reference only?

12 MR. AHERN: Well, that's what they said. That's what
13 they said. You know, I would just say that you'd be --

14 THE COURT: It wasn't admitted into evidence. I can't
15 send it out. Let's throw these two out of here. Chris, I'm
16 saying that it was not admitted into evidence. Use your best
17 recollection.

18 (Recess from 2:22 p.m., until 2:25 p.m.)

19 MR. DESTEFANO: Has to be the same answer.

20 THE COURT: What's that?

21 MR. DESTEFANO: Has to be the same answer.

22 THE COURT: I don't remember the chart. What chart is
23 it?

24 MR. DESTEFANO: It's the chart that both experts used.
25 I used it in closing. Yeah, that's one version of it.

1 Mg EKG. Your Honor referred to it as an EKG.

2 MR. AHERN: Based on the actual data, and it was used
3 by both --

4 MR. DESTEFANO: Well, it was a different version
5 (indiscernible). But again --

6 THE COURT: Neither one -- none of them was admitted.

7 MR. DESTEFANO: No.

8 THE COURT: Chart not admitted into evidence. Use
9 best recollection. That's all I can say.

10 (Recess at 2:28 p.m., until 2:38 p.m.)

11 (Jury in 2:39 p.m.)

12 THE COURT: All right, welcome back. Everyone please
13 be seated.

14 COURT OFFICER: Foreperson of the jury, please rise.
15 Members of the jury, in the matter of Winn-Dixie Stores, Inc.,
16 et al vs. Eastern Mushroom Marketing Cooperative, Inc., Civil
17 Action Number 15-6480, as to question 1, do you find by a
18 preponderance of the evidence that there was a single
19 overarching conspiracy to raise the prices of agaricus
20 mushrooms by, one, circulating minimum or target price lists
21 along with rules and regulations requiring EMMC members to
22 charge those prices, and two, acquiring properties that were
23 historically used for mushroom farming to reduce or limit the
24 supply of fresh agaricus mushrooms, including by placing deed
25 restrictions on the properties to prevent their future use as

1 mushroom farms. Yes, or no?

2 JURY FOREMAN: Yes.

3 COURT OFFICER: Question two, do you find by a
4 preponderance of the evidence that any of the following
5 Defendants participated in the above-described single
6 overarching conspiracy to raise the prices of agaricus
7 mushrooms, A, Brownstone Mushroom Farms, Inc., yes or no?

8 JURY FOREMAN: No.

9 COURT OFFICER: B, C&C Carriage Mushroom Company, yes,
10 or no?

11 JURY FOREMAN: No.

12 COURT OFFICER: C, Country Fresh Mushroom Company,
13 yes, or no?

14 JURY FOREMAN: No.

15 COURT OFFICER: D, Gino Gaspari and Sons, Inc., yes,
16 or no?

17 JURY FOREMAN: No.

18 COURT OFFICER: E, Giorgi Mushroom Company, yes, or
19 no?

20 JURY FOREMAN: No.

21 COURT OFFICER: F, Kaolin Mushroom Farms, Inc., yes,
22 or no?

23 JURY FOREMAN: No.

24 COURT OFFICER: G, Leone Pizzini and Sons, Inc., yes,
25 or no?

1 JURY FOREMAN: No.

2 COURT OFFICER: H, Louis M. Marson, Jr., Inc., yes, or

3 no?

4 JURY FOREMAN: No.

5 COURT OFFICER: I, Modern Mushroom Farms, Inc., yes, or

6 no?

7 JURY FOREMAN: No.

8 COURT OFFICER: J, Monterey Mushrooms, Inc., yes, or

9 no?

10 JURY FOREMAN: No.

11 COURT OFFICER: K, Oakshire Mushroom Farms, Inc., yes,

12 or no?

13 JURY FOREMAN: No.

14 COURT OFFICER: L, Phillips Mushroom Farms, Inc., yes,

15 or no?

16 JURY FOREMAN: No.

17 COURT OFFICER: M, South Mill Mushroom Sales, Inc.,

18 yes, or no?

19 JURY FOREMAN: No.

20 COURT OFFICER: N, The Eastern Mushroom Marketing

21 Cooperative, Inc., yes, or no?

22 JURY FOREMAN: Yes.

23 COURT OFFICER: O, To-Jo Fresh Mushrooms, Inc., yes,

24 or no?

25 JURY FOREMAN: No.

1 COURT OFFICER: P, United Mushroom Farm Cooperative,
2 Inc., yes, or no?

3 JURY FOREMAN: No.

4 COURT OFFICER: Question three, do you find by a
5 preponderance of the evidence that Defendant, Oakshire Mushroom
6 Farms, Inc., and Oakshire Mushroom Sales, LLC satisfy the
7 ownership and control exception the Court explained, yes, or
8 no?

9 JURY FOREMAN: Yes.

10 COURT OFFICER: Question four, do you find by a
11 preponderance of the evidence that the single overarching
12 conspiracy was anticompetitive, such that it caused the price
13 of fresh agaricus mushrooms to be higher than it would have
14 otherwise been, yes, or no?

15 JURY FOREMAN: No.

16 COURT OFFICER: Thank you, ladies and gentlemen.

17 THE COURT: All right. Ladies and gentlemen of the
18 jury, I want to thank you for your attention, your time, and
19 concentration on what was going on here. And you're excused
20 from jury service with the thanks of the Court. And as you go
21 out to the jury room, I'm going to be coming after, because I
22 know you probably have questions of me, and I'm happy to answer
23 them. All right, thank you very much. You're excused.

24 JURY FOREMAN: Thank you.

25 UNKNOWN SPEAKER: Thank you.

1 (Jury out at 2:45 p.m.)

2 (Court adjourned.)

3 CERTIFICATION

4 I certify that the foregoing is a correct transcript from the
5 electronic sound recording of the proceedings in the above-
6 entitled matter.

7

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Elizabeth Knittle

March 16, 2022

10 Elizabeth Knittle

Date

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